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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD,

Petitioners,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE Supreme COURT ~~OF APPEALS~~ OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

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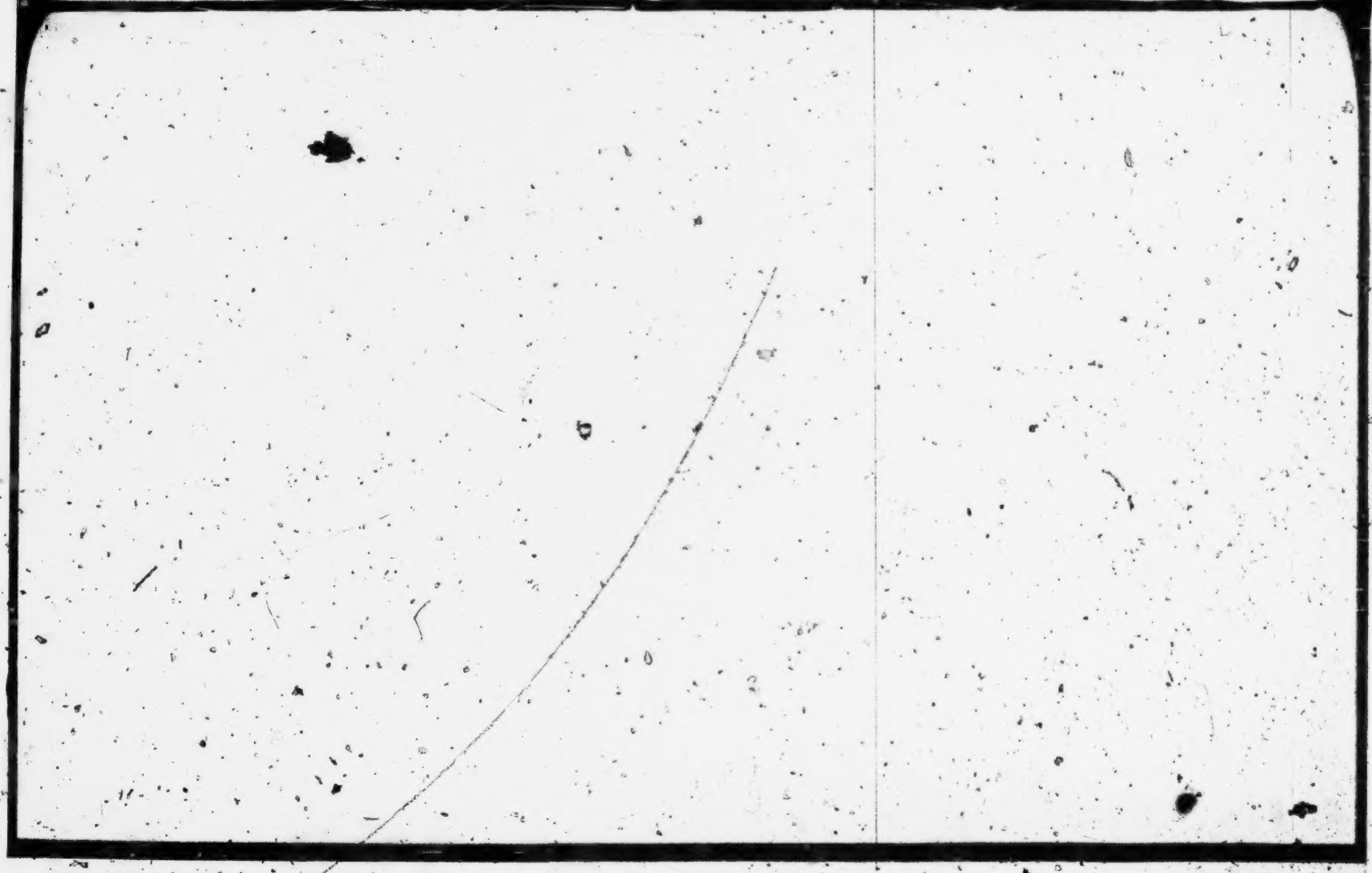

SUBJECT INDEX.

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Questions Presented	1
Statement of the Case	2
Reasons for Allowance of Writ	3
BRIEF IN SUPPORT OF PETITION	6
A. Opinions of the Courts Below	6
B. Jurisdiction	7
C. Statement of Facts	9
D. Specifications of Error	9
E. Summary of Argument	10
POINT I. Meaning of Word "Legislature" as Used in the Constitution of the United States	11
POINT II. Inapplicability of Ohio, ex rel. Davis vs. Hildebrandt, 241 U. S. 565	11
POINT III. Expiration of Act of August 8, 1911 (Chapter 5, 37 Statutes at Large 13)	12
POINT IV. Word "Legislature" Must Be Held to Have Same Meaning Whenever Used in the Same Document	15

Cases Cited.

Behan v. The People, 17 N. Y. 516, 520	15
Cherokee National v. George, 5 Pet. 1, 18-20	15
Clifford v. West Hartford Creamery Co., 153 Atl. 205	15
Courtauld v. Legh, L. R. IV Ex. 126	15
Davis v. Hildebrandt, 241 U. S. 565	10, 11
Hawke v. Smith, 253 U. S. 221	2, 11, 15, 17
Hood Rubber Company v. Comm. of Corp., 167 N. E. 670	15
In re Kirkstall Brewery Co. Ltd., 5 Ch. D. 535	15, 16
Lewellyn v. Harbison, 31 Fed. 2nd 740, 842	15
Mangam v. The City of Brooklyn, 98 N. Y. 585, 591-2	15, 16
McPherson v. Blacker, 146 U. S. 1,	2, 11, 15
Moran v. Bowley (not yet reported)	4
Pine v. Commonwealth, 121 Va. 812	15

PAGE

R. vs. Poor Law Commissioners, 6 A. & E. 56.....15, 16
Smiley v. Holm, 238 N. W. Rep. 494.....4, 8, 9
State ex rel. Carroll v. Becker (not yet reported).....4, 14
U. S. v. Sprague, 282 U. S. 716.....2, 11, 15, 17

Text Books and Encyclopedias Cited.

2 Lewis Sutherland on Statutory Construction, p. 578.. 15
26 A. & E. Enc. of Law, p. 534..... 12
25 Ruling Case Law 995..... 15

Constitution and Statutes Cited.

United States Constitution
Article I, Sec. 3..... 16
Article II, Sec. 1, Clause 2.....1, 8, 10, 15
Article I, Sec. 4.....1, 2, 3, 4, 5, 7. 8, 9, 10, 11, 16
Article V 8, 10, 15
New York State Constitution
Article III, Sec. 1..... 2
Article IV, Sec. 9..... 2
Sec. 237 Judicial Code of the U. S. (28 U. S. C. A. 344).. 7
Act of Congress August 8, 1911 (Chapter 5, 37 Statutes at Large 13).....2, 3, 4, 7, 8, 9, 10, 11, 13, 14
Act of Congress June 18, 1929.....7, 8, 10, 14
Concurrent Resolution of April 10, 1931 of the Legislature of the State of New York.....2, 3, 7, 10
1 Stat. at Large 253..... 12
2 Stat. at Large 128..... 13
2 Stat. at Large 669..... 13
3 Stat. at Large 651..... 13
4 Stat. at Large 516..... 13
5 Stat. at Large 491..... 13
9 Stat. at Large 433..... 13
12 Stat. at Large 353..... 13
17 Stat. at Large 28..... 13
22 Stat. at Large 5..... 13
26 Stat. at Large 735..... 13
31 Stat. at Large 733..... 13
37 Stat. at Large 13..... 13

IN THE

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SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD,
Petitioners,
against
EDWARD J. FLYNN, Secretary of State of the State of New York,
Respondent,
and
JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named, Samuel S. Koenig, John J. Knewitz and William L. Ward, pray for a writ of certiorari to review an order and decision of the Court of Appeals of the State of New York, being the court of last resort of that State, affirming a final order of the Supreme Court of the State of New York.

Questions Presented:

1. Has the word "Legislature" in Section 4 of Article I of the Constitution of the United States any other or dif-

ferent meaning than the same word in Section 1 Clause 2 Article II as adjudicated by this Court in *McPherson* v. *Blacker* (146 U. S. 1), or than that adjudicated by this court in *Hawke* vs. *Smith,* 253 U. S. page 221 and *U. S.* vs. *Sprague,* 282 U. S. page 716?

2. Has the Act of Congress of August 8, 1911 expired by its express terms and by force of its character, or is it still a valid and subsisting law of the United States?

3. Is the Concurrent Resolution adopted by the Senate and Assembly, constituting the Legislature of the State of New York, a valid and effective division of the State of New York into forty-five Congressional Districts pursuant to the provisions of Section 4 Article I of the Constitution of the United States?

Statement of the Case.

On April 10th, 1931 the Senate and Assembly vested with Legislative power of the State of New York (New York State Constitution, Article III, Section 1) adopted a Concurrent Resolution dividing the State of New York into forty-five Congressional Districts (R. 12; 37-58). Subsequently, the Attorney-General of the State by communication to the respondent, Secretary of State dated August 4, 1931, advised the Secretary of State that in the opinion of the Attorney-General this Concurrent Resolution of the Legislature of the State of New York was invalid and ineffective for any purpose in that it had not been approved by the Governor of the State of New York, pursuant to Article IV, Section 9 of the New York State Constitution (R. 13-14). The petitioners thereupon served a demand on the respondent, Secretary of State, that in issuing his certificates required by the Election Law of the State of New York in the year 1932 in connection with the election of Representatives in Congress, he recognize the Concurrent Resolution of April 10, 1931 of the Legislature of the State of New York as valid and effec-

tive (R. 14). The respondent, Secretary of State, refused to comply with this demand and notified the petitioners that he would treat the resolution in question as a nullity (R. 15): whereupon the petitioners made application to the Supreme Court of the State of New York for a mandamus order directing the Secretary of State to issue his election certificates in compliance with said Concurrent Resolution (R. 8-9). That application came on before Hon. Ellis J. Staley, a Justice of the Supreme Court of the State of New York at Special Term, and was denied by said Justice (R. 5-7). An appeal (R. 3-4) was thereupon taken to the Appellate Division of the Supreme Court of the State of New York, Third Department, from the order of Mr. Justice Staley denying the application for mandamus and said Appellate Court, after hearing argument, affirmed the order appealed from (R. 108-110). Your petitioners thereupon appealed (R. 106-107) to the Court of Appeals of the State of New York, the court of last resort, from the order of the Appellate Division of the Supreme Court and said Court of Appeals has affirmed the order of the Appellate Division (R. 137).

Reasons for Allowance of Writ.

1. This cause draws into question Section 4 Article I of the Constitution of the United States, the Act of Congress of August 8, 1911, and the Act of Congress of June 18, 1929.

2. The questions involved or some of them have arisen in four states, viz: New York, Illinois, Minnesota and Missouri.

The Supreme Court of Minnesota in a proceeding instituted to restrain the Secretary of State from receiving certificates of nomination in Congressional Districts established by a bill vetoed by the Governor of Minnesota, has held

(a) That the Act of Congress of August 8, 1911 has expired.

(b) That the word "Legislature" used in Section 4 of Article 1 of the United States Constitution means the bi-cameral body and excludes the Governor.

(c) That the Legislature of Minnesota validly established Congressional Districts.

Smiley vs. *Holm,* 238 N. W. Rep. page 494.

The Supreme Court of Illinois has held that the Act of Congress of August 8, 1911 has not expired and is a subsisting, valid law of the United States, and that an Act of the Legislature of Illinois dividing the State into Congressional Districts, was void and of no effect because violative of the provisions of the Act of Congress of August 8, 1911 (*Moran* vs. *Bowley,* not yet reported).

The Supreme Court of Missouri, has held:

(a) That the Act of August 8, 1911 has not expired but is still a subsisting law of the United States.

(b) That the word "Legislature" used in Section 4, of Article I of the Constitution of the United States means the lawmaking power of the State of Missouri including the Governor.

State ex rel. Carroll v. *Becker,* not yet reported.

The Court of Appeals of the State of New York, in the instant case, has held:

(a) That the word "Legislature" as used in Section 4 of Article I of the Constitution of the United States means the law-making power of the State including the Governor (R. 133-134).

(b) That the Act of Congress of August 8th, 1911 has not expired and continues to be a valid and enforcible law of the United States (R. 134-135).

(c) That consequently, the attempted division of the State of New York by Concurrent Resolution of the Legislature not approved by the Governor of the State, was ineffective (R. 134).

3. The election of Representatives in Congress being the election of Federal officers governed by the controlling provisions of Article I, Section 4 of the United States Constitu-

tion the law applicable thereto should be uniform throughout the United States.

WHEREFORE your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the Supreme Court ~~of Appeals~~ of the State of New York commanding the said Court to certify the above cause to this Court for review and determination as provided by law, and that your petitioners may have such other or further relief or remedy in the premises as this Court may deem appropriate.

Dated, February 18, 1932.

SAMUEL S. KOENIG,
JOHN J. KNEWITZ,
WILLIAM L. WARD,
(Petitioners)

By ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Counsel for Petitioners.

IN THE

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SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD,
Petitioners,
against
EDWARD J. FLYNN, Secretary of State of the State of New York,
Respondent,
and
JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

BRIEF IN SUPPORT OF PETITION.

A.

Opinions of the Courts Below.

The opinion rendered in the Supreme Court, Albany County, Special Term, appears in 141 Misc. 840 and in the Record, pages 92-103.

The opinions rendered by the Appellate Division of the Supreme Court, Third Department, have not yet been reported but appear in the Record, pages 111-125.

The opinion of the Court of Appeals, the Court of last resort of the State of New York, has not yet been reported but appears in the Record, pages 127-136.

B.

Jurisdiction.

The Appellate jurisdiction of the Supreme Court of the United States is invoked under Section 237 Judicial Code of the United States (28 U. S. C. A. Sec. 344) to correct error of the Court of Appeals of the State of New York in the above cited case.

The petitioners brought suit in the Supreme Court of the State of New York to compel the Secretary of the State of New York, by Mandamus Order, to recognize the validity of a concurrent resolution adopted by the Senate and Assembly, constituting the Legislature of the State of New York (New York State Constitution, Article III, Sec. 1) adopted April 10, 1931, dividing the State of New York into forty-five congressional districts. The Supreme Court of the State of New York at Special Term denied the application for a mandamus order (R. 5-7). The Appellate Division of the Supreme Court of the State of New York affirmed the order of the Court at Special Term (R. 108-110). The Court of Appeals of the State of New York has affirmed the order of the Appellate Division of the Supreme Court of the State of New York, Third Department, which affirmed the order made in Special Term (R. 137).

The case at bar comes within the Appellate jurisdiction of this Court by reason of the admitted allegations set forth in the petition for the mandamus order, which facts are not here repeated to save space and the time of this Court. The provisions of Article I, Section 4 of the Constitution of the United States and the Act of Congress of August 8, 1911 and the Act of Congress of June 18th, 1929, are drawn into question. It was contended by the petitioners in the Court below that the word "Legislature" in Section 4 of Article I of the Constitution of the United States means the same bi-cameral body (the Senate and Assembly constituting the Legislature of the State of New York) as the bi-cameral body referred

to in Section 1, Clause 2 of Article II, and Article V and other sections of the Constitution of the United States where the term "legislature" is used; that under the Constitution of the State of New York, the Governor was not part of the bi-cameral body; that the Act of Congress of August 8th, 1911 was by its express terms, limited in its purpose and effect to the apportionment made thereby, and expired with the apportionment of members of the House of Representatives to the various states under the Act of Congress of June 18, 1929; that the Legislature of the State of New York was not restricted in its creation of Congressional Districts for the election of Representatives in Congress by the provisions of the Act of August 8th, 1911; that the resolution of the Legislature of the State of New York redistricting the State into 45 Congressional Districts did not require the approval of the Governor of the State of New York and was valid and effective without such executive action.

The Court of Appeals of the State of New York has held:

(a) That the word "Legislature", as used in Sec. 4 of Article I of the Constitution of the United States, has a meaning different and other from that assigned to it by this Court under other articles and sections of the United States Constitution, and means in said Sec. 4 of Article I the law-making power of the State of New York, including the Governor (R. 133-134);

(b) That the Act of Congress of August 8th, 1911 has not expired and continues to be a valid and enforceable law of the United States (R. 134-135); and

(c) That the attempted division of the State of New York by concurrent resolution of the Legislature, not approved by the Governor of the State was ineffective (R. 134).

The petition of W. Yale Smiley to this Court to review the final judgment of the Supreme Court of Minnesota in

Smiley v. *Holm,* involving questions similar to those presented by the case at bar, has been granted by this Court and that case (*Smiley* v. *Holm*) is now in this Court for adjudication.

Smiley v. *Holm,* No. 617 October 1931 Term, writ of certiorari granted by the Supreme Court of the United States February 15th, 1932.

C.

Statement of Facts.

The facts involved in the case at bar are not in dispute. They were admitted by the respondents in their argument and in the briefs below. They are substantially as set forth in the petition (pp. 2-3).

D.

Specifications of Error.

1. The Court of Appeals of the State of New York erred in affirming the order of the Appellate Division of the Supreme Court, Third Department, which had affirmed an order of the Supreme Court at Special Term, denying petitioner's application for a mandamus order.

2. The Court of Appeals of the State of New York erred in construing the word "Legislature" in Article I, Section 4 of the Federal Constitution as meaning the law-making power of the State of New York, including the Governor, requiring executive action by the Governor of that State.

3. The Court of Appeals of the State of New York erred in holding that the Act of Congress of August 8th, 1911 is an existing and continuing valid act of Congress.

4. The Court of Appeals of the State of New York erred in holding that the concurrent resolution adopted by the Legislature of the State of New York on April 10th, 1931 was invalid and ineffective because it had not received the approval of the Governor of the State of New York.

E.

Summary of Argument.

The contentions of the petitioners may be briefly summarized as follows:

Petitioners contend that the word "Legislature" as used in Section 4 of Article I of the Constitution of the United States means the bi-cameral body (in New York State the Senate and Assembly) constituting the Legislature of the State of New York; that it has the same meaning in Section 4 of Article I as in Section 1 Clause 2 of Article II and elsewhere in the Constitution; that this Court has definitely held that the word "Legislature" as used in Section 1 Clause 2 of Article II and in Article V and other sections of the Constitution means the bi-cameral body and excludes executive action by the Governor.

Petitioners further contend that the Act of August 8th, 1911 was limited to the apportionment therein made and expired with the enactment of the Act of June 18th, 1929 and the new apportionment thereunder, wherefor respondent's view of the case of *Ohio ex rel. Davis* v. *Hildebrandt*, 241 U. S. 565, is not applicable to the case at bar.

It is further contended by the petitioners that no distinction can be drawn between the legislative activity in respect of the election of representatives in Congress under Section 4 of Article I of the Constitution of the United States and the activity of the Legislature in respect of the election of United States Senators pursuant to the same section, and in respect of other duties conferred upon the Legislatures of the States pursuant to other sections of the United States Constitution; that in any event, the action of the Legislature of the State

of New York now in question, i. e., the division of the State into Congressional Districts, was not a State lawmaking function as held by the Court of Appeals of New York but the exercise of a political or administrative function pursuant to the provisions of Sec. 4 of Article I of the United States Constitution; wherefor petitioners contend that the concurrent resolution of the Legislature of the State of New York now in question is a valid and effective subdivision of the State of New York into 45 Congressional Districts.

POINT I.

The meaning of the word "Legislature" as used in the Constitution of the United States has been settled by this Court.

McPherson vs. *Blacker*, 146 U. S. 1;
Hawke vs. *Smith*, 253 U. S. 221;
United States vs. *Sprague*, 282 U. S. 716.

In the cases cited this Court held the word "Legislature" to mean the bi-cameral body representing the People of the State.

POINT II.

The case of *Ohio ex rel. Davis* vs. *Hildebrandt*, 241 U. S. 565, is not applicable to the case at bar.

In *Davis* vs. *Hildebrandt*, *supra*, this Court had before it two principal questions:

1. Whether the Act of Congress of August 8, 1911 was constitutional; and

2. Whether that Act was applicable to a law of the State of Ohio dividing that State into Congressional Districts.

With respect to these two questions, this court held

1. That the Act of Congress of 1911 was constitutional; and

2. That by reason thereof the Ohio statute was properly submitted to the people of Ohio pursuant to the referendum provisions of the Constitution of Ohio.

That case (*Davis* vs. *Hildebrandt*) is only applicable in support of respondent's contention if the Act of August 8, 1911 has survived and is still a subsisting and valid law of the United States.

Our contention is that the Act of August 8, 1911 has expired and is no longer a subsisting and valid law.

POINT III.

The Act of Congress of August 8, 1911 (Chapter 5, 37 Statutes at Large 13) was limited to the apportionment therein made and expired with the new apportionment under the Act of June 18, 1929.

It is our contention that that Act (Act of August 8, 1911) was a temporary statute, limited in duration at the time of its enactment by the express language thereof and by force of its character, and has therefore expired.

26 A. & E. Enc. of Law, page 534, citing 1 Bouv. Inst. 112.

In accordance with the provisions of the Federal Constitution a census of the population of the United States was had in 1790 following which Congress passed its first apportionment act, effective April 14, 1792 (1 Stat. at Large 253). This was a very brief act, consisting of but one short paragraph, conforming to the requirements of the Constitution and fixed the basis for representation in Congress. Similar

acts followed the census of 1800, 1818, 1820 and 1830 (2 Stat. at Large, 128, 2 Stat. at Large, 669, 3 Stat. at Large 651, 4 Stat. at Large 516).

Following the census of 1840 Congress passed its Sixth Apportionment Act (5 Stat. at Large 491). It consisted of two paragraphs, the first one apportioning the number of representatives to the various states; the second Section provided

> "That in every state where a state is entitled to more than one representative in Congress, the number shall be elected by districts composed of contingious territory equal in number to the number of representatives to which such state may be entitled no district to be entitled to more than one representative."

In 1850 Congress enacted a statute effective May 23, 1850 (9 Stat. at Large 433) which provided for the taking of the Seventh Decennial Census and for the apportionment of representatives in Congress. It contained no provision for the election of representatives by districts.

Following the census of 1860 Congress enacted its Eighth Apportionment Act (12 Stat. at Large 353), and following each census thereafter down to and including the Thirteenth Census, Congress enacted apportionment acts substantially repeating the preceding apportionment act, but adding provisions from time to time with reference to the method of electing representatives in Congress (17 Stat. at Large, 28, 22 Stat. at Large 5, 26 Stat. at Large 735, 31 Stat. at Large 733, 37 Stat. at Large 13).

Beginning with the Act of 1880 (22 Stat. at Large 5) each apportionment act by express language limited its application to the apportionment then made.

The Act of August 8, 1911 following the census of 1910 contains express language limiting its application to the apportionment made thereunder and that act in Section 4 thereof contained a provision which appears for the first time in this series of legislation, requiring the subdivision of states into congressional districts *by law of the state.* It

makes provision for continuing the congressional districts existing on August 8, 1911 where there has been no increase, or an increase, in the number of representatives apportioned to the state, and in case of an increase it made provision for the election of additional representatives at large, until the State had been redistricted pursuant to the laws thereof.

Congress failed in its duty to apportion representatives in Congress following the Fourteenth Census. In June 1929 Congress enacted a census and Apportionment Act (37 Stat. at Large 13) similar to the Act of 1850 (9 Stat. at Large 433), except that it provided a different method of determining the number of representatives apportioned to the various states. Under the Act of June 18, 1929 the number was apportioned by certificate of the President based upon the census of 1930.

The apportionment thus made increased the number of representatives in the State of New York and in other states, and decreased the number of representatives in Minnesota, Missouri and in some other states. It is impossible to make the Act of August 8, 1911 apply to conditions now existing in a state such as New York which has an increased number of representatives. The Missouri Supreme Court has held in a case recently decided and not yet reported (*Carroll* vs. *Becker*) that under the circumstances the State of Missouri was compelled to elect its representatives at large.

POINT IV.

No distinction can reasonably be drawn between the legislative activity in respect of the election of representatives in Congress under Section 4 of Article I of the Constitution and the activity of the Legislature in respect of the election of United States Senators pursuant to the same section and in respect of the appointment of Presidential Electors under Section 1, Clause 2, Article II, and of other duties conferred upon the legislatures of the States pursuant to other sections of the United States Constitution.

What the word "Legislature" means when used in Article II, Section 1, Clause 2, as determined by this Court in *McPherson* v. *Blacker, supra,* and in Article V of the Constitution as determined by this Court in *Hawke* vs. *Smith, supra,* it must reasonably be held to mean whenever used in the same document.

Behan vs. *The People,* 17 N. Y. 516, at page 520;
Mangam v. *The City of Brooklyn,* 98 N. Y. 585, 591-2;
The Cherokee National vs. *George,* 5 Pet. 1, 18-20;
25 Ruling Case Law, 995;
2 Lewis Sutherland on Statutory Construction, p. 578;
Hood Rubber Company vs. *Comm. of Corp.,* 167 N. E. 670;
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Clifford vs. *West Hartford Creamery Co.,* 153 Atl. 205;
Lewellyn vs. *Harbison,* 31 Fed. 2nd 740, 842;
In re Kirkstall Brewery Co., Ltd., 5 Ch. D. 535;
R. vs. *Poor Law Commissioners,* 6 A. & E. 56;
Courtauld vs. *Legh,* L. R. IV Ex. 126.

We quote from the opinion of Cleasby, B., in *Courtauld* vs. *Legh,* as follows:

> "It is a sound rule of construction to give the same meaning to the same words occurring in different parts of an act of parliament or other document."

Chief Judge Ruger, writing for the Court of Appeals of New York in *Mangam* vs. *The City of Brooklyn, supra,* at page 592, quotes from *R.* vs. *Law Commissioner, supra,* the following:

> "'We disclaim altogether the assumption of any right to assign different meanings to the same words in an act of Parliament on the ground of a supposed general intention in the act, we think it is necessary to give a fair and reasonable construction to the language used by the legislature; but we are not to assume the unwarrantable liberty of varying that construction for the purpose of making the act consistent with any views of our own'."

In *In re Kirkstall Brewing Company, Ltd., supra,* the Court said:

> "It is at all events reasonable to presume that the same meaning is intended for the same expression in every part of the act."

The use of this word "Legislature" both in respect of the choosing of Senator (Sec. 3, Art. I) and prescribing the times, places and manner of choosing the Senators (Sec. 4, Art. I) and prescribing the times, places and manner of electing Representatives in Congress (Id.), when taken in connection with the use of the word "Legislature" in respect of the appointment of electors, the ratification of amendments to the Constitution, the calling for assistance of the Federal Government in case of internal disturbance, the consent necessary to acquiring property in the state by the Federal Government for Federal purposes, all confirm the view that the word "Legislature", wherever used in the Constitution of the United States, means the same body representing the

people of the state, so definitely described by this Court in *Hawke* v. *Smith, supra.*

The meaning of the word "Legislature" as used in Article V of the Federal Constitution was again before this Court in *United States of America* vs. *Sprague,* decided February 24th, 1931 (282 U. S. 716). Mr. Justice Roberts, delivering the opinion of the Court in that case, said at page 730:

> "The United States asserts that Article V is clear in statement and in meaning, contains no ambiguity, *and calls for no resort to rules of construction.* A mere reading demonstrates that this is true."

We respectfully submit that the prayer of the petitioners should be granted.

ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Counsel for Petitioners.